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Supreme Court of the United States

CROSS COUNTRY BANK, INC.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
by ANDREW CUOMO, Attorney General
of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF OF AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE, AND THIRTEEN STATE BANKING ASSOCIATIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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BRIEF OF AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE, AND THIRTEEN STATE BANKING ASSOCIATIONS

At issue in this case[1] is the preservation of one of the foundational concepts governing the regulation of credit card applications or solicitations: that the disclosure of information regarding the terms of the credit offered to a potential customer is governed by

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[1] This brief is filed with the written consent of Petitioners and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than ABA and its members, made a monetary contribution to the preparation or submission of the brief.

a *uniform* set of federal rules that applies across each of the fifty states. Congress created such a uniform system when it amended the *Truth In Lending Act* ("TILA") in 1988 to regulate the disclosure of the relevant terms of a credit card solicitation to potential customers. In particular, Congress amended TILA to include an express preemption clause providing that TILA's credit card solicitation disclosure requirements, together with implementing regulations promulgated by the Board of Governors of the Federal Reserve (the "Federal Reserve"), supersede "*any* provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation." 15 U.S.C. § 1610(e) (emphasis added).

The nationwide uniformity that Congress thereby mandated for regulation of credit card disclosures is critical: the relevant market for the nation's credit card issuers is not just one or two jurisdictions, but rather it encompasses all fifty states. It was in recognition of this fundamental fact that Congress comprehensively preempted all state law in this area and delegated the task of setting national standards for credit card solicitation disclosures to a single federal agency, the Federal Reserve. The New York Court of Appeals' ruling casts aside this statutorily-mandated uniformity and threatens to balkanize credit card regulation, subject consumers to an ever-expanding mishmash of confusing credit card disclosures and burden issuers with a patchwork of inconsistent state laws regarding the adequacy of credit card disclosures. Such a result cannot be reconciled with the express Congressional determination to impose an across-the-board

preemption of state law in favor of a uniform nationwide disclosure regimen crafted, updated and maintained by a single federal regulatory authority, the Federal Reserve.

INTEREST OF THE AMICI

Amicus Curiae American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

The Consumer Bankers Association ("CBA") is a nonprofit national trade association founded in 1919. CBA provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

The Financial Services Roundtable is a national association whose membership represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $66.1 trillion in managed assets, $1.1 trillion in revenue, and 2.5 million jobs.

Also appearing as *amici* are state bankers associations from 13 different states, including the New York Bankers Association.[2] These associations represent the interests of their members (which include state and federally chartered banks, as well as savings and loan associations). They provide a voice for the industry in state legislatures across the nation, as well as providing support to their members with research and information, public relations, continuing professional education, and business development.

The *amici* have a direct interest in the outcome of this litigation. According to the Government Accountability Office ("GAO"), commercial banks are the largest issuers of credit cards in the United States; based on the most recent figures available, more than 6,000 depository institutions in the United States issue credit cards.[3] The outcome of this case directly affects the manner in which credit card issuers solicit customers in New York and, potentially, other states as well.

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[2] Joining the brief are the California Bankers Association, the Delaware Bankers Association, the Georgia Bankers Association, the Illinois Bankers Association, the Kentucky Bankers Association, the Michigan Bankers Association, the Missouri Bankers Association, the Nevada Bankers Association, the New York Bankers Association, the Oregon Bankers Association, the Pennsylvania Bankers Association, the Tennessee Bankers Association, and the West Virginia Bankers Association,

[3] Government Accountability Office, Report to the Ranking Minority Member, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate (September 2006), at 10. Available at http://www.gao.gov/new.items/d06929.pdf.

REASONS WHY THE WRIT SHOULD BE GRANTED

The *Amici* respectfully submit that the Court should grant review to avoid perpetuating an erroneous precedent that is harmful to the nation's banking and credit card industry – a harm that will spread as it is adopted in other jurisdictions. While the suit brought by the New York Attorney General is based upon state statutes designed to address unfair and deceptive practices – statutes that do not *overtly* attempt to regulate credit card disclosures – the *Amici* are concerned that the practical result of the New York Court of Appeals' decision is to engraft on to the uniform federal disclosure requirements under TILA a special set of disclosure rules for New York residents. *Amici* certainly do *not* condone or defend any activity or solicitation by a credit card issuer that is unscrupulous or deceptive.[4] However, the Court should not abide New York's attempt to short-circuit the uniform regulatory scheme created by Congress, whatever its motivation may be. Congress deliberately designed the federal statutory scheme in a manner that established a *nationally uniform* set of standards for credit card solicitations via rulemaking by the Federal Reserve. Under the Supremacy Clause, those standards preempt any state action such as that taken by New York in this case.

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[4] *Amici* take no position regarding the alleged practices at issue in this case.

I. THE *FAIR CREDIT AND CHARGE CARD DISCLOSURE ACT* AMENDMENTS TO TILA RECOGNIZE THAT THE CREDIT CARD MARKET IS NATIONAL IN SCOPE.

When Congress enacted TILA in 1968, its stated purpose was to provide a statutory scheme that assured "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). TILA sets forth a variety of credit-related disclosure requirements, which, pursuant to Congressional directive, have been implemented through regulations promulgated by the Board of Governors of the Federal Reserve, 12 C.F.R. Part 226 (2007) (known as Regulation Z).

After twenty years of experience with the statute, Congress amended TILA in 1988 when it enacted the *Fair Credit and Charge Card Disclosure Act* ("FCCCDA"), Pub. L. No. 100-583, 102 Stat. 2960 (1988). The purpose of the amendments was

> to provide for more detailed and uniform disclosure of rates and other cost information in applications and solicitations to open credit and charge card accounts. Consumers will be given basic cost information about credit and charge cards at an earlier time than under the current provisions

> of the TILA in order to enhance credit shopping.[5]

The FCCCDA amendments enacted by Congress required changes to both the substance and the form of solicitations and applications for credit card products, prescribing a detailed set of uniform requirements for disclosures in such solicitations and applications. *See* 15 U.S.C. §§ 1632 (1988); 15 U.S.C. § 1637(c) (2005). The FCCCDA was notable for the creation of the now-familiar data table known as the "Schumer box" (in recognition of the role played by Representative (and now Senator) Charles Schumer in implementing this change) that breaks down the relevant terms of the credit product on offer.

The utility of standardizing, on a nationwide basis, TILA's requirements for credit card disclosures as a tool to empower consumers was not lost on Congress. Prior to the 1988 amendments, it was difficult for consumers to make meaningful comparisons of credit card offerings. Representative Schumer noted during the debate over the approval of the FCCCDA Conference Report that:

> When I first became involved in this issue several years ago, I was shocked to realize that consumers had no way of comparing the interest rates different cards charge. They had no way of knowing the grace period for repayment. And sometimes the annual fee the card charged was not even

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[5] 54 Fed. Reg. 13855-01 (April 6, 1989); 1989 WL 276413.

> listed. Credit card consumers were buying a pig in a poke.
>
> *****
>
> I am optimistic that this bill will result in millions of savings for consumers. The bill will ensure that every consumer knows the real cost of all credit cards and allows them to shop around for the lowest rates.[6]

Representative Schumer's comments acknowledging the benefit to consumers of being able to compare "apples to apples" with respect to credit card offers were echoed by Representative John Hiler from Indiana:

> The disclosure provisions of the bill will benefit consumers in several ways. First, the disclosure provisions may enhance competition among credit and charge card providers, allowing the marketplace to operate more efficiently and resulting in lower interest rates and other more favorable terms. Second, clear disclosure of key terms will help consumers to understand better what obligations they will incur under various credit card programs. Third, this advance information will allow consumers to make better informed comparisons among credit plans

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[6] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

> without the need to first complete the application process. *Finally, the conference report adopts a single uniform Federal standard that will greatly assist consumers in comparison shopping between credit card programs.*[7] (Emphasis added).

Likewise, Representative Doug Barnard, Jr., from Georgia re-emphasized that the ability to compare the relevant terms of a credit offering is an important part of the legislation:

> It is a bill requiring comprehensive fair, simple and uniform disclosure of the basic terms of credit cards, which are the Nation's third medium of exchange after checks and cash.
>
> Disclosure is fundamental to a competitive economy. Credit is a resource or a commodity like any other and if the price and other relevant terms are disclosed in advance of the transaction, consumers can obtain the best product at the lowest price.
>
> When you go to purchase a TV, you look at the price and other features. Among several TV's of the same size, you may choose the cheapest with fewer features or you may pay more for a feature like remote control even though picture size and quality are the

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[7] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

> same. You also may be able to purchase that same TV cheaper at another store or you may be willing to pay more at a store that delivers or is close to home. It's your choice, and as long as you have the necessary information you can make the optimum decision for yourself.
>
> The situation is no different for credit cards. Some cards offer a lower rate but no grace period. Others offer features like a grace period, merchandise rebates, travel services and the like. *If these terms are disclosed conspicuously in the same manner and location according to the type of application or solicitation, as provided by H.R. 515, then consumers can choose the card and combination of terms best for them.*[8] (Emphasis added).

See also Remarks of Representative Fernand St. Germain, 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988) ("The legislation requires uniform disclosures of interest rates and other fees that consumers face in making a decision to apply for a credit or charge card.").

The debate in the House of Representatives regarding the FCCCDA Conference Report leaves no doubt that *uniformity* in the mandated disclosures

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[8] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

was deemed to be a critical element in enabling consumers to understand and compare in a meaningful way the features and cost of credit card products they are being offered. Moreover, Congress recognized that nationwide uniformity required that the disclosure requirements mandated in the FCCCDA be linked with an express provision for preemption of state law. By expressly providing for such preemption, Congress balanced the burden imposed on the banking industry with the benefit to both the industry and consumers of the new disclosure requirements by making credit card offers subject to a single, uniform *federal* standard.

II. CONGRESS BALANCED THE BURDEN PLACED ON THE BANKING INDUSTRY BY EXPRESSLY PREEMPTING STATE LAW.

A full understanding of the preemption issue currently before the Court depends in part upon a recognition of the fact that the disclosure provisions of the FCCCDA were enacted as one piece of a larger compromise over the entirety of the FCCCDA. Industry support for this landmark legislation was tied to provisions in the House version of the bill that, in exchange for tougher disclosure rules, ensured that the banking and credit card industry would not be subject to a patchwork of state laws regarding credit card disclosures.

During the Congressional debate leading up to the passage of the FCCCDA, one of the points of contention was whether the states should be left free to enact their own statutes that would supplement the disclosures mandated under the amended provisions of TILA. In order to gain industry support for the stronger disclosure requirements, the House

version of the bill, H.R. 515, contained a provision that expressly preempted state law regarding credit card disclosure – the same provision that eventually was enacted into law as 15 U.S.C. § 1610(e).

Some, like Representative Frank Annunzio from Illinois, opposed the bill on the grounds that the preemption provisions would

> strip States of their power to provide additional protection for their citizens. Currently, there are 10 States with credit card disclosure laws. The 82 million citizens of those States-who make up one-third of the population of this Nation-will lose the protections that their elected State representatives gave them if we preempt their laws. The legislatures of the other 40 States will be told that they are barred from protecting their citizens.[9]

Representative St. Germain expressed a similar preference for amendments that would have preserved the ability of the states to enact credit card disclosure laws:

> Mr. Speaker, there was a great deal of discussion about the relationship of the Federal law to the various State disclosure laws.

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[9] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

> Some of us, frankly, had hoped that we could avoid a flat preemption of State laws and allow the so-called truth-in-lending approach to apply-an approach which would have allowed States to enact credit card disclosure laws so long as they were not inconsistent with the Federal law.[10]

The compromise that was ultimately struck, however, resulted in a bill that rejected continued reliance on the existing conflict preemption clause in TILA,[11] and instead expressly preempted state law while at the same time mandating disclosures that were "tougher than any current State law."[12] Concerns raised by those Representatives troubled by the blanket preemption of state law contained in the bill were addressed via a specific grant of authority to the Federal Reserve that would allow that regulatory agency to supplement the consumer disclosure provisions via regulation – in essence taking over the role that had historically been

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[10] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

[11] When it was initially enacted in 1968, TILA preempted only "inconsistent" state law, *i.e.*, state laws whose application would conflict with TILA's requirements. *See* 15 U.S.C. § 1610(a)(1). That standard still applies to certain TILA provisions, but *not* to the provisions governing credit card solicitations and applications.

[12] 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988)(Comments of Rep. Barnard). See also comments of Rep. St. Germain, *Id.* ("Ultimately, however, we settled on a compromise which...brought the provisions of this legislation to the outer limits of the strongest laws now on the books in any State.").

accorded to state legislatures under TILA. This grant of authority to the Federal Reserve

> is an important element of the bill, and is in response to the fact that the bill would preempt state credit card disclosure laws. For example, if the Board finds that additional disclosures – such as any that could be required in the two States – Wisconsin and Illinois – that may require additional disclosures than does the Federal law – are necessary to carry out the purpose of the law, the Board has the authority to add these disclosures to the Federal law."

Speech of Representative John J. La Falce (New York), 134 Cong. Rec. E3574-02, 1988 WL 182027 (Oct. 21, 1988). One significant difference, however, between the historic practice of relying upon state legislatures to supplement TILA disclosures and the FCCCDA approach of authorizing the Federal Reserve to adopt regulations to supplement the mandatory credit card disclosures is that any regulation promulgated by the Federal Reserve applies *uniformly* across all 50 states – not just within a single state jurisdiction – and it has the full force and preemptive affect of federal law.[13]

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[13] More recently, the Superintendent of Banks for the New York Banking Department somewhat begrudgingly reached a similar conclusion in testimony before Congress:

> Given an industry that is dominated by national bank credit card issuers and subject

(...continued)

Finally, for some members of the Conference Committee, the compromise on preemption made sense given the fact that the credit card market is truly national in scope and that a large percentage of the credit card industry operates in multiple jurisdictions.

This fact raised the strong possibility that the majority of institutions serving this national market would have been subject to conflicting state-mandated disclosure rules, making a compromise on the preemption issue both appropriate and necessary:

> ...[C]redit cards, unlike mortgages, or auto loans, or home loans, are indeed a national industry. The large issuers

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(...continued)

> to the realities of federal preemption, state regulation of credit card practices is presently not a viable option. State regulation would apply only to a minority of consumers and would have the unfortunate and unintended consequence of putting state chartered entities at a competitive disadvantage. *Based on court decisions it seems that the only option is for the federal government to adopt national standards to address credit card problems on a nationwide basis which would then protect all of the citizens in our states.*

Testimony of Richard H. Neiman, Superintendent of Banks, New York State Banking Department, on behalf of the Conference of State Bank Supervisors, Before the Financial Services Subcommittee on Financial Institutions and Consumer Credit of the United States House of Representatives (June 7, 2007), at 10. Available at: http://www.house.gov/apps/list/hearing/financialsvcs_dem/htneiman060707.pdf.

> control a lot of the market. If they are willing to go for tough disclosure, provided that they do not have to make different types of disclosure in each of the 50 States, that to me is a trade that benefits consumers, and it is a trade that ought to be made.[14]

The concerns that motivated Congress to recognize the wisdom of compromise and enact a statute that expressly preempts any state laws concerning credit card disclosures twenty years ago remain today. Uniformity of regulation and the avoidance of a patchwork of state laws regarding the adequacy of credit card disclosures are necessary to facilitate the smooth and efficient operation of our nation's interstate banking and credit card industry. The New York Court of Appeals' decision threatens to destroy this compromise, and the Court should grant the petition for review in order to overturn that ruling.

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[14]134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988)(Comments of Rep. Barnard).

III. THE *FAIR CREDIT AND CHARGE CARD DISCLOSURE ACT* FULLY PREEMPTS STATE LAW REGARDING CREDIT CARD DISCLOSURES TO FACILITATE THE ABILITY OF FINANCIAL INSTITUTIONS TO OFFER CREDIT CARD PRODUCTS ON A NATIONWIDE BASIS.

The *Amici* submit that the Court should set aside the lower court's ruling that provisions of the New York General Business Code may be used to create a special set of disclosure rules for New York residents. The preemption provisions enacted as part of the FCCCDA amendments to TILA fully preempt *any* state law relating to the disclosure of information in any credit or charge card application. 15 U.S.C. § 1610(e). This conclusion is compelled by the plain language of the statute, the unambiguous legislative history of the FCCCDA, and the official staff interpretation of TILA rendered by the Federal Reserve.

Section 4(2) of the FCCCDA amended TILA to provide for the complete preemption of *any* state law "relating to the disclosure of information in any credit or charge card application or solicitation. . . ." 15 U.S.C. § 1610(e). Section 1610(e) provides that:

> The provisions of subsection (c) of section 1632 [which relates to the form of credit and charge card application disclosures] and subsections (c), (d), (e) and (f) of section 1637 [which relates to the content of required credit and charge card application and annual fee renewal disclosures] *shall supersede any provision of the law of any State relating*

> *to the disclosure of information in any credit or charge card application or solicitation* which is subject to the requirements of section 127(c) . . . or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

15 U.S.C. § 1610(e) (emphasis added). Consistent with the statutory language, the Federal Reserve's implementing regulations for TILA – Regulation Z – reflect this "special rule" regarding the enhanced preemptive affect of TILA's rules governing credit card disclosures:

> State law requirements relating to the disclosure of credit information in any credit or charge card application or solicitation that is subject to the requirements of section 127(c) of chapter 2 of the act (§ 226.5a of the regulation [relating to required credit and charge card application disclosures]) . . . are preempted.

12 C.F.R. § 226.28(d) (2007)(emphasis added). The broad preemptive effect mandated by the language of the statute and implementing regulation is confirmed by the Official Staff Interpretation to Regulation Z: "[t]he Fair Credit and Charge Card Disclosure Act *fully preempts* state laws relating to

the disclosure of credit information in consumer credit or charge card applications or solicitations."[15]

The *Amici* submit that the Court of Appeals' ruling below imposes disclosure obligations that differ in substance and form from those required by TILA. The fact that the New York Attorney General's case is based upon state statutes designed to address unfair and deceptive practices that do not overtly attempt to regulate credit card disclosures cannot mask the preemptive effect of 15 U.S.C. § 1610(e) and Regulation Z. The action brought against Petitioners by the New York Attorney General plainly undermines the ability of the credit card and banking industry to rely upon the TILA rules to determine the adequacy of the disclosures made in credit card solicitations. As is made plain by TILA itself, state laws may be "employ[ed]" only "for the purpose of enforcing the requirements of [Sections 1637(c) and 1637(d) of TILA]." The intention of Congress was clear: credit card issuers are to be subject to tough requirements regarding solicitations, but those requirements are to be dictated solely by the Federal Reserve and must be *uniform* across the nation.

CONCLUSION

The outcome of this case will directly affect the manner in which credit card issuers solicit customers in New York and, most likely, other states as well. The Court should grant review to avoid perpetuating

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[15] 12 C.F.R. Part 226, Supplement I (Official Staff Interpretations).

an erroneous precedent that, if adopted in other jurisdictions, will directly harm the nation's banking and credit card industry.

Respectfully submitted,

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